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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/882,100

06/15/2001

Arthur J. Carlson

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10/17/2005

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EXAMINER

PERILLA, JASON M

ART UNIT

PAPER NUMBER

2638

DATE MAILED: 10/17/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

09/882,100

Applicant(s)

CARLSON, ARTHUR J.

Examiner

Jason M. Perilla

Art Unit

2638

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 26 September 2005 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attached Response to Arguments.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____.
13. ☐ Other: _____.


KENNETH VANDERPUYE
SUPERVISORY PATENT EXAMINER

Response to Arguments

1. Applicant's arguments filed September 26, 2005 have been fully considered but they are not persuasive.

Regarding the Applicant's arguments against the rejection of claims 1 and 7, under 35 U.S.C. §103(a) as being obvious over Bremer (US 6546090) in view of Dirschedl (US 6262994), the Applicant contests the Examiner's assertion that the prior art discloses in combination "information regarding a data rate" as applied to claims 1 and 7. The Applicant respectfully disagrees that prior art reference to "the error rate of data" constitutes the claimed "information regarding a data rate."

The Applicant cites *Newton's Telecom Dictionary*, 21st Edition, 2005, page 236 for a definition of a "data rate" which describes a data rate to be "the rate at which a channel carries data, measured in bits per second, also known as the data signaling rate.... In short, data rate is the measurement of how quickly data is transmitted." (Remarks of September 26, 2005; pg. 6, lines 3-5). The Examiner readily adopts *Newton's* definition.

In the arguments of the final office action dated July 26, 2005, the Examiner stated that "a 'data rate' does encompass data which is received correctly against data which is not recovered due to errors in the transmission." (pg. 2, lines 16-18). In view of the definition of a "data rate" as provided by *Newton's*, the Examiner's statement is definitively incorrect. However, in view of *Newton's* definition of a "data rate", the Examiner insists that, as additionally provided in the final office action, the determination

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of an error rate is the determination of information regarding a data rate, and clarifies the argument below.

Conclusively, the Applicant states that “[t]he measure of data rate, which is in bits per second, does not provide any indication of the amount of error of a transmitted signal but merely ***the amount of data (correct and erroneous)*** that is transmitted thorough a channel.” (Remarks; pg. 6, lines 11-14) (emphasis added). The Examiner concurs and points out that the Applicant’s own definition of –data- in “a data rate” is any data both correct and erroneous. Hence, the “data rate” definition of *Newton’s* reduces to “the rate at which a channel carries both correct and erroneous data.” Therefore, the claimed “information regarding a data rate” is regarded to be, as originally set forth by the Examiner, information regarding [the erroneous data] of a data rate, or the bit error rate. The Examiner insists that such an reduction in claim language is supported by the definitions of the key terms in the art as provided by *Newton’s* and according the definitions of terms as accepted by both the Examiner and the Applicant. The prior art of record only needs to disclose information regarding a data rate as claimed. Because the data rate is the rate of both correct and erroneous data, the error rate of the data is *information regarding at least the erroneous data*. Or, as more specifically pointed out by the Applicant citing *Newton’s*, the “error rate” is a ratio of the erroneous elements transmitted to the total number of elements transmitted. Thus, the bit error rate aptly fits the definition of “information regarding the data rate” because the data of the “data rate” contains correct and erroneous elements just as specified in the definition of the “error rate”.

2. Regarding the Applicant's arguments against the rejection of claim 13, under 35 U.S.C. §103(a) as being obvious over Bremer in view of Dirschedl, the Applicant contests the Examiner's assertion that the prior art discloses in combination "estimating a maximum receive data rate" as applied to claim 13.

However, the Examiner notes that the error rate of the data transmission is an obvious corollary to the maximum receive data rate. That is, a higher error rate corresponds to a lower maximum receive data rate and a lower error rate corresponds to a higher maximum receive data rate as understood by one having skill in the art. While Dirschedl provides that the error rate of the data (col. 2, lines 60-68) is compared with a threshold, one skilled in the art finds a functional equivalence between estimating a maximum receive rate and finding the bit error rate in a bandwidth-limited channel.